**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil No: 1:99CV02706 |
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| HARSCO CORPORATION, | ) | |
| PANDROL JACKSON LIMITED, | ) | Filed: 10/14/99 |
| PANDROL JACKSON INC., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

## COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

### I. NATURE AND PURPOSE FOR THE PROCEEDING

On October 14, 1999, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of assets of Pandrol Jackson Limited and Pandrol Jackson Inc. (collectively "Pandrol") by Harsco Corporation ("Harsco") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, with respect to the manufacture and sale of switch and crossing and transit grinding equipment and the provision of switch and crossing and transit grinding services to railroads and transit systems throughout North America. The Complaint alleges that Harsco and Pandrol are the only two producers of such equipment and providers of such services in North America. The

request for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) injunctive relief preventing consummation of the proposed acquisition; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order that would settle the lawsuit. The proposed settlement permits Harsco to acquire the assets of Pandrol, but requires a divestiture that will preserve competition in the relevant product markets alleged in the Complaint. The proposed Final Judgment requires the defendants to divest switch and crossing grinding assets, as defined in the proposed Final Judgment, acquired by Harsco from Pandrol related to the switch and crossing grinding equipment manufactured by Pandrol and to the switch and crossing grinding services provided by Pandrol. Switch and crossing grinding equipment manufactured by Pandrol includes rail grinders and any related equipment used to remove surface irregularities and to restore the profile of the rail used in transit systems, railroad track switches and railroad track crossings. Switch and crossing grinding services includes such services provided by contract to railroads and transit systems. Defendants must accomplish this divestiture within thirty (30) calendar days after the filing of the proposed Final Judgment to a purchaser acceptable to the Antitrust Division of the United States Department of Justice ("DOJ"). If the defendants do not do so within the time frame in the proposed Final Judgment, a trustee appointed by the Court would be empowered for an additional six months to sell those assets. If the trustee is unable to do so in that time, the Court could enter such orders as it shall deem appropriate to carry out the purpose of the trust which may, if necessary, include extending the trust and the trustee's appointment by a period requested by the United States.

In addition, under the terms of the Hold Separate Stipulation and Order, the defendants must hold specified assets to be divested separate and apart from its other businesses until the required divestiture has been accomplished. Defendants must, until the required divestiture is accomplished, preserve and maintain the specified assets to be divested as saleable and economically viable ongoing concerns.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

### A. The Defendants and the Proposed Transaction

Harsco is a Delaware corporation, with its corporate headquarters and principal place of business in Camp Hill, Pennsylvania. In 1998, Harsco reported revenues of $1.7 billion. It manufactures switch and crossing grinding equipment in Fairmont, Minnesota. In 1998, its sales of switch and crossing grinding services were about $3.7 million in North America, with about $3.2 million of this amount to customers in the United States.

Charter plc ("Charter") is a corporation organized and existing under the laws of the United Kingdom. In 1998, it had revenues of approximately $2 billion. Charter controls Pandrol Jackson Limited and Pandrol Jackson Inc. (collectively "Pandrol") through a wholly owned subsidiary. Pandrol Jackson Limited maintains its principal place of business in Surrey, United Kingdom. Pandrol Jackson Inc. is a Delaware corporation, with its corporate headquarters and

principal place of business in Ludington, Michigan. Pandrol manufactures rail grinders at its plant in Ludington, Michigan. During 1998, Pandrol had sales of about $101 million, including $5.7 million in sales of switch and crossing grinding services and equipment in North America, $4.3 million of which was from sales to customers in the United States.

On or about January 30, 1998, Harsco entered into an Asset Purchase and Liability Assumption Agreement ("Agreement") with Charter to acquire the switch and crossing and transit grinding equipment and the switch and grinding services of Pandrol for consideration equal to about $89 million. This transaction, which would give Harsco a monopoly of the manufacture and sale of switch and crossing grinding equipment (including transit grinders) and of switch and crossing grinding services in North America, precipitated the government's suit.

B. The Market

Rail grinders are used because, over time, the rubbing of train wheels on the tracks deforms the profile of the rails. These deformations, if allowed to continue, cause the rail to wear out prematurely. Switch and crossing grinders are designed to restore the rail used in railroad track switches and railroad track crossings to its original shape, thereby prolonging its useful life. Transit grinders are smaller grinders, like switch and crossing grinders, which are used to perform the same function of restoring rail for transit systems. Although transit systems in North America typically purchase transit grinders, railroads usually contract for grinding services from providers of switch and crossing grinding services. Harsco and Pandrol are the only providers of these services in North America. No imports of switch and crossing and transit grinders are made into North America and switch and crossing grinding services are provided throughout North America only by firms that manufacture such grinders in the United States.

C. Harm to Competition as a Result of the Proposed Transaction

Harsco and Pandrol compete with each other in the production and sale of switch and crossing and transit grinders and in providing switch and crossing grinding services in North America -- a market which is now highly concentrated and which would become a monopoly as a result of the proposed acquisition. Harsco and Pandrol are the only two producers of this equipment, and the only suppliers of these services. The proposed transaction would eliminate the direct competition between Harsco and Pandrol that has benefited consumers, and likely lead to higher prices.

Moreover, new entry into the production and sale of switch and crossing and transit grinders and in providing switch and crossing grinding services is unlikely to occur and unlikely to be timely or sufficient to defeat a post-acquisition price increase.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief described in the proposed Final Judgment will eliminate the anticompetitive effects of this transaction by establishing a new, independent, and economically viable competitor in each of the affected markets. The proposed Final Judgment requires Harsco to divest the switch and crossing grinding assets of Pandrol as a viable ongoing business to a purchaser acceptable to the United States in its sole discretion. This divestiture must take place within 30 days of the filing of the Hold Separate Stipulation and Order in this case unless the United States in its sole discretion extends the time for the divestiture for an additional period not to exceed 30 days. If the divestiture has not been accomplished within these time periods, then a trustee selected by the United States, in its sole discretion, shall be appointed to sell the Pandrol switch and crossing grinding assets to a purchaser who will use the assets as a viable ongoing business engaged in the

switch and crossing grinding business. Under the proposed Final Judgment, the trustee has the right to require divestiture of additional related assets if reasonably necessary to divest the switch and crossing grinding assets as a viable stand-alone business.

If a trustee is appointed, the proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if no divestiture has been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

The proposed Final Judgment specifies that the required divestiture shall be made to a purchaser who, as demonstrated to the sole satisfaction of the United States, has the capability and intent, as well as the managerial, operational, and financial capability to compete effectively in the switch and crossing grinding business and who is not hindered by the terms of any agreement between it and Harsco under which Harsco possesses the ability unreasonably to raise the purchaser’s costs, lower its efficiency, or otherwise interfere with its ability to compete. Pending the required divestiture, Harsco must maintain and separately operate the switch and crossing grinding assets as an independent competitive business, with management, research, development, production, sales and operation of such assets held entirely separate, distinct and apart from those of Harsco. The divestiture required by the proposed Final Judgment is designed to ensure that the competition that would be eliminated by the proposed acquisition will be preserved and maintained.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer, II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the proposed Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits. The United States is satisfied that the divestiture required by the proposed Final Judgment will maintain viable competition in the relevant product market alleged in the Complaint and will effectively prevent the anticompetitive effects that the Complaint alleges would result from the proposed acquisition.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). The courts have recognized that the term "'public interest' take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," Northern Pacific Railway Co. V. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir.1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

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[1]119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass.1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. §16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues.

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). See also Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

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See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[2] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a proposed final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[3]

[7] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

## VIII. DETERMINATIVE DOCUMENTS

There were no determinative documents, within the meaning of the APPA, that were considered by the United States in formulating the proposed Final Judgment.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: November 11, 1999.

Respectfully submitted,

_____/s/_____
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